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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1936.

No. 55.

The Pep Boys, Manny, Moe & Jack of California, a corporation,

Appellant,

vs.

Pyroil Sales Company, Inc., a corporation,

Appellee.

APPELLANT'S BRIEF.

Opinions Below.

The opinions of the Supreme Court of the State of California have not yet been officially reported. They may be found, however, in 91 California Decisions 367, 520, 55 P. (2d) 194. The opinions in *Max Factor & Co. v. Kunsman*, a companion case decided the same day, may be found in 91 California Decisions, 345, 521, 55 P. (2d) 177.

The opinions in both cases are printed at pages 13 to 48 of the statement as to jurisdiction, heretofore filed. The opinion in the instant case is also printed at pages 9 to 10 of the transcript of the record.

Statement of the Case.

This is an appeal from a judgment of the Supreme Court of the State of California reversing a judgment of the Superior Court of that state dismissing the complaint of appellee.[1] The case arose under an act of the legislature of California commonly known as the "Fair Trade Act."[2] That act provides, in substance, that no contract relating to the sale or resale of any commodity bearing, or the label or content of which bears, the trademark, brand or name of the producer, shall be deemed in violation of any law of the state of California by reason of any provision fixing the price at which the vendee may resell that commodity; and that knowingly advertising, offering for sale or selling any such commodity at less than the price fixed in any such contract, whether the offeror or seller be a party to such contract or not, is unfair competition and actionable at the suit of any person damaged thereby. [*California Statutes,* 1931, c. 278, p. 583, sec. 1; *California Statutes,* 1933, c. 260, p. 793, sec. 1½; *post,* pp. 7-8.]

Pursuant to the provisions of this statute, appellee commenced an action in the Superior Court in which it sought to enjoin appellant, who had not entered into any price-fixing arrangement with appellee, from offering for sale or selling a certain trademarked commodity called "Pyroil" at prices less than those fixed in various contracts between appellee and dealers other than appellant.

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1. The parties will be referred to here by their designations in this court.

2. The act is printed in full, *post,* pp. 7-8.

[R. 1-7.] A demurrer to appellee's complaint was sustained by the Superior Court without leave to amend and a judgment of dismissal entered. [R. 7, 8.] On appeal to the state Supreme Court this judgment was reversed with directions to enter a judgment for appellee as prayed. [R. 9-10, 12.]

The only question considered by the state Supreme Court was the constitutionality of the Fair Trade Act. [R. 9-10.] The material allegations of appellee's complaint upon which the decision of that question was made to depend are as follows:[3]

There has developed in the automobile accessory trade in California a practice of cutting the price of well-established trademarked commodities and using these commodities as "leaders" or "loss leaders" to attract prospective purchasers, the dealer depending upon those so attracted to purchase other articles yielding a sufficiently large profit to make up for the losses involved in such cut prices. [R. 2-3.] To remedy this evil, the legislature adopted the Fair Trade Act. [R. 3.]

Pyroil is a lubricating substance bearing distinctive trademarks, names and labels, manufactured and patented by the Pyroil Company (not appellee) of La Crosse, Wisconsin. Through advertising in national publications and otherwise Pyroil has become a well-established commodity enjoying a good reputation. [R. 2.] Appellee, by virtue of contracts with its manufacturer, has the sole right to

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3. The order of statement adopted here is not that followed in the complaint, but no material allegation is omitted.

sell and distribute this commodity in Southern California. [R. 1.]

Appellee has adopted a system of doing business which consists of entering into contracts with dealers in Southern California obligating the latter to sell Pyroil only at certain specified prices. These prices are fair and reasonable, and practically all dealers in Southern California have executed such contracts with appellee. [R. 3-4.] Appellant has always had the opportunity to purchase Pyroil on the same terms and conditions as other dealers but has not done so. Instead it has obtained the product elsewhere from sources unknown to appellee. [R. 4.]

As a result of these contracts and of appellee's system of merchandising appellee enjoys a reasonable profit in the sale of its products, immunity from injurious and uneconomic price-cutting, and unobstructed distribution of its products; the public has benefited through reasonable prices and high quality; and dealers obtain a reasonable compensation for their services. [R. 3.]

Appellant, operating six retail stores in Southern California, for the purpose of disrupting and interfering with appellee's contracts and business, has wilfully and knowingly advertised, offered for sale, and sold Pyroil at less than the prices stipulated in said contracts. [R. 4, 5.] As the result of these acts of appellant other dealers have been induced and forced to cancel and threaten to cancel their price-fixing contracts with appellee and to refuse to accept further deliveries of Pyroil; the public is induced to believe that Pyroil is not worth the price at which it is nationally advertised; and other dealers cannot market the product at the fixed or advertised prices and threaten to discontinue its sale. [R. 5.]

The acts complained of have caused and will cause irreparable injury to appellee for which it has no adequate remedy at law. [R. 6.] The nature of this injury, except as it may be inferred from the other facts pleaded, is not stated.

State Statute Involved.

The Fair Trade Act, as amended in 1933, reads as follows [*California Statutes,* 1931, c. 278, p. 583; *California Statutes,* 1933, c. 260, p. 793; *Deering's General Laws of California,* 1931, Vol. 3, Act 8782, p. 4910; *Deering's Codes, Laws and Constitutional Amendments of California,* 1933 Supp., Act 8782, p. 2396]:

> "AN ACT to protect trade mark, owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade mark, brand or name.
>
> THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:
>
> Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of California by reason of any of the following provisions which may be contained in such contract:
>
> 1. That the buyer will not resell such commodity except at the price stipulated by the vendor,
>
> 2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

1. In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court.

Sec. 1½. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Sec. 2. This act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

Sec. 3. The following terms, as used in this act, are hereby defined as follows:

'Producer' means grower, baker, maker, manufacturer or publisher.

'Commodity' means any subject of commerce.

Sec. 4. If any provision of this act is declared unconstitutional it is the intent of the Legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

Sec. 5. This act may be known and cited as the 'Fair Trade Act.'"

Specification of Errors.

1. The state Supreme Court erred in reversing the judgment of the Superior Court dismissing the complaint herein. [R. 11.]

2. Said Supreme Court erred in holding that section 1½ of the Fair Trade Act was not repugnant to Article XIV of Amendments to the Constitution of the United States, and did not deny due process of law to appellant. [R. 11.]

3. Said Supreme Court erred in holding that the Fair Trade Act did not deny to appellant the equal protection of the laws within the meaning of Article XIV of Amendments to the Constitution of the United States. [R. 11.]

Question Presented.

The sole question presented here is whether a state legislature, consistently with the due process and equal protection clauses of the Fourteenth Amendment, can empower private persons in their absolute and uncontrolled discretion to fix the selling price of all ordinary commodities owned and offered for sale by another in the ordinary course of retail business merely because the commodities bear the producer's trademark, name or brand.

Summary of the Argument.

The Fair Trade Act is repugnant to the due process clause of the Fourteenth Amendment because it is arbitrary, unreasonable and capricious and without real or substantial relation to its alleged purpose. The act is defective in these particulars because: (1) It vests in the producer of, and competing dealers in, trademarked, branded or named commodities the power to fix and control the price at which appellant may sell these commodities, notwithstanding that appellant is the owner of them and has not agreed in any way to maintain their price, and this without any standard set up in the statute or any supervision by the state. (2) Notwithstanding the allegation that the statute is designed to prevent the evils thought to flow only from the use of trademarked commodities as "leaders" or "loss leaders", it is in terms applicable to all selling at prices less than those fixed by the producer, without regard to motive or result, and, in the case at bar, has been applied as against a dealer who is not alleged either to have used the product in question as a "leader" or to have sold it below cost. (3) It is in effect a price-fixing statute applicable generally, without regard to the necessity for such regulation or the interest of the public in the industries and trades affected.

The act also is repugnant to the equal protection clause of the Fourteenth Amendment because it exempts price-fixing agreements in respect of trademarked or named commodities from the provisions of the state's general anti-trust law while leaving in force the prohibition against such agreements in respect of similar commodities not so marked or named.

ARGUMENT.

I.

Section 1½ of the Fair Trade Act Is Repugnant to the Due Process Clause of the Fourteenth Amendment.

From the complaint and from the opinions of the court below, it is made to appear that the primary purpose of the Fair Trade Act is to protect producers, retailers and the public from the injurious consequences thought to follow from the practice of "leader" or "loss leader" merchandising of trademarked articles. [R. 2-3; *Max Factor & Co. v. Kunsman, supra,* 91 California Decisions, at 348-9, 55 P. (2d) at 179, Jurisdictional Statement, p.17.] Nothing in the language of the statute bears out this characterization of its purpose. On the contrary, as we show later [*post,* pp. 18-22; 26], the act in its necessary operation and effect goes much farther. But for the purpose of testing its validity upon the footing on which it is sought to be defended, we may, for the moment, accept the pleaded characterization.

There is undoubtedly a sharp conflict of opinion as to whether so-called price-cutting by retailers is an evil and price maintenance economically desirable.[4] With the wis-

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4. Discussions of this subject may be found in HARING, *Retail Price Cutting and Its Control by Manufacturers,* p. 12 *et seq.*; MURCHISON, *Resale Price Maintenance,* Columbia Univ., Studies in History, Economics and Public Law, vol. 82, no. 2, pp. 21-84; SELIGMAN AND LOVE, *Price Cutting and Price Maintenance, passim;* FEDERAL TRADE COMMISSION, *Report on Resale Price Maintenance,* Part II, pp. 4-5; 10 New York Univ. Law Quarterly, 502, 506; *Encyclopedia of the Social Sciences,* vol. 13, p. 326.

dom of the choice which the legislature has made in that regard we are not concerned here. We are very much concerned, however, with the question of whether in putting that choice into effect the legislature has exceeded the constitutional limits of its power.

In order to suppress the asserted evils with which the statute is supposed to deal the legislature has not only validated voluntarily executed contracts fixing the resale price of branded goods, but has also declared that anyone, even if he is not a party to any such contract, who knowingly and wilfully sells the same brand of goods at prices lower than those fixed in any contract between other people, is engaging in unfair competition, actionable at the suit of any person damaged thereby. It is with this latter aspect of the statute that this case deals.

In arguing that such a statute deprives the appellant of its liberty and property without due process of law, the legitimacy of the alleged legislative purpose and the power to accomplish it may, for argument's sake only, be assumed. Even upon this assumption it would still be necessary, before a statute like the one here challenged could be said to be constitutional, to find that "the means selected . . . have a real and substantial relation to the object sought to be attained" and that they are not "unreasonable, arbitrary or capricious." [*Railroad Retirement Board v. Alton R. Co.*, 295 U. S. 330, 347, 79 L. Ed. 1468, 1475, 55 S. Ct. 758, 761-2, note 5; *Nebbia v. New York*, 291 U. S. 502, 525, 78 L. Ed. 940, 950, 54 S. Ct. 505, 510-11, 89 A. L. R. 1469, 1476; *Louis K. Liggett Co. v. Baldridge*, 278 U. S. 105, 111-113, 73 L. Ed. 204, 208-9, 49 S. Ct. 57, 59; *Jay Burns Baking Co. v. Bryan*, 264 U. S. 504, 513, 68 L. Ed. 813, 826, 44

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That the means by which the purpose of the Fair Trade Act is to be accomplished are arbitrary, capricious, and unreasonable and without real or substantial relation to the object of the statute may, we believe, be readily demonstrated.

A. The Delegation to Third Persons of the Power to Control Another's Property Is an Arbitrary Denial of Due Process.

The Fair Trade Act neither declares price-cutting as such to be obnoxious to the public interest nor prohibits the act of cutting prices. Instead, and in necessary effect, it delegates to the producer and to any competing dealer the power, first, to fix the price which shall prevail in respect of any particular commodity, and second, by appropriate suits in equity or actions at law, to compel—not necessarily *all* dealers—but such dealers as they may select to adhere to that price.

The statute sets up no standard by which the action of the person demanding price maintenance is to be guided. For all that appears in the act, adherence may be required of all non-assenting dealers, or of only some of them. The moving party, be he producer or competitor, is left free to act or not, as he sees fit. He may be prompted to act by proper considerations or he may be

moved solely or largely by self-interest, by whim, or even by malice or spite. In either event, the choice rests with him and the non-assenting dealer is made subject to that choice.

The price that is fixed may be high or low, but whatever it is, the dealer, whose freedom of action is thereby affected, has no voice in the fixing, nor is he given the protection of any governmental supervision of the process. Uniformity of price is not a condition of resort to the statute. The producer may fix as many different prices as he has contracts; the non-assenting dealer may be compelled to adhere to the price fixed in "any contract", in other words, to such one of the varying prices as the producer or a competitor may select.

It is very plain, therefore, that what the Fair Trade Act does is to give to third persons the uncontrolled power over the property of another. In the ordinary case—and certainly in the case at bar—the retail dealer is the owner of the goods which he keeps for sale. He may acquire them, as in this case the appellant did, free of agreements restricting their subsequent disposition. [R. 4.] Being the owner, and not having bound himself to do otherwise, he may ordinarily fix his own price. The privilege so to do is one of the inherent attributes of the ownership of property. [*Tyson & Bro. v. Banton*, 273 U. S. 418, 429, 71 L. Ed. 718, 722, 47 S. Ct. 426, 428, 58 A. L. R. 1236, 1241; *Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522, 537-8, 67 L. Ed. 1103, 1109, 43 S. Ct. 630, 633-4, 27 A. L. R. 1280, 1287.]

Granting, for argument's sake, that this right or privilege of fixing one's own price may be restricted in the public interest, it does not follow that the restriction may take

the form of a delegation of the power of control to a third party. In the very nature of things, control of the property of one person at the discretion or whim of another, who may even be a competitor of the former, is an arbitrary limitation upon the controlled person's liberty. It is arbitrary because it leaves to an interested—perhaps adversely interested—private person the power of imposing a restriction on another's liberty, without any assurance that his action will be guided by those considerations of public welfare which furnish the only justification for permitting the restriction at all.

A delegation of power in all respects analogous to the one here involved was but recently said by this Court to be "so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause" as to need no more than a reference "to decisions of this court which foreclose the question." [*Carter v. Carter Coal Co.*, 298 U. S. ....., 80 L. Ed. (Adv. Ops.) 749, 769-70, 773, 56 S. Ct. (Adv. Ops.) 855, 872-3, 876.] In that case, it will be recalled, an Act of Congress empowered a majority of coal producers and miners to fix minimum wages and maximum hours of labor which, when fixed, should bind all. The legislation, although confined to a single distressed major industry and a single commodity, was struck down, in this particular, because of the arbitrary nature of the method by which wages and hours were established. The Fair Trade Act, we submit, is not in this respect essentially different.

Nor is there any difference in principle between the Fair Trade Act and the legislation considered in *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U. S. 116, 73 L. Ed. 210, 49 S. Ct. 50, 86 A. L. R. 654, and in

Eubank v. Richmond, 226 U. S. 137, 57 L. Ed. 156, 33 S. Ct. 76, Ann. Cas. 1914B, 192, 42 L. R. A. (N. S.) 1123. In each of those cases the statute involved gave to third persons the power to curtail or regulate the use which another could make of his own property; and in each of them the delegation was held to be arbitrary, and, therefore, repugnant to the Fourteenth Amendment, even though the purpose in aid of which the power was given, was, generally speaking, within the sphere of legitimate state action. See, also, *Southern R. Co. v. Virginia ex rel. Shirley,* 290 U. S. 190, 194-7, 78 L. Ed. 260, 264-6, 54 S. Ct. 148, 149-51; *Doubleday-Doran & Co. Inc. v. R. H. Macy & Co.,* 269 N. Y. 272, 199 N. E. 409, 103 A. L. R. 1325; *Johnson & Johnson v. Weissbard,* .... N. J. Eq. ...., 184 Atl. 783.

It is no answer to the argument made here that ample safeguards against arbitrary exertion of the delegated power may be provided by the court before whom any particular case is heard, either by denying injunctive relief when it would be inequitable not to do so or by appropriate conditions inserted in its decree. No such flexible power is purported to be given by the statute, nor is the relief which may be had limited to the discretionary remedies available in a court of equity. An action at law will lie too. [Sec. 1½, *ante,* p. 8.] And in any event, the constitutional rights of a litigant must be preserved by the statute itself—it is not enough to leave them to the discretion of the courts. [*Louisville & Nashville R. R. v. Central Stockyards Co.,* 212 U. S. 132, 144, 53 L. Ed. 441, 446, 29 S. Ct. 246, 248. And compare *Southern R. Co. v. Virginia ex rel. Shirley, supra,* 290 U. S. at 198-9, 78 L. Ed. at 266, 54 S. Ct. at 151.]

Nor is it any answer to say, as appellee has said, that the presence of the producer's trademark on the goods in some way justifies the delegation to him of the power to control their resale even after title has passed. To begin with, such an answer overlooks the fact that the trademark owner is not the only person in whom the statute vests this power—any other dealer in the same commodity is similarly empowered. In fact, in the case at bar the appellee is not the owner of the Pyroil trademark, but is apparently a jobber and retailer. [R. 1-2.] Furthermore, it is not even necessary that the producer have a trademark or that the mark, if he has one, be on the article. It is enough, for the purposes of the Fair Trade Act, if only his name appear somewhere on the commodity or on its label. That name, or even the mark itself, may be so new, so little used or so unknown to the public as not to be entitled to protection as a trademark or tradename. Yet, it is said, its mere presence is sufficient to give the producer such an interest in property owned by another as to justify restriction of the latter's freedom of use at the whim of the former.

The basic flaw in appellee's argument, however, is that it involves a misconception of the true nature of a trademark. A trademark is a mark of origin only. It does not give to its owner any greater rights in the article to which it is attached than if the article had been sold without it. The owner of trademarked goods may use them as he sees fit, so long, of course, as he tells the truth about them. His freedom in this respect has never been thought to be restricted by the presence of another's mark. [*Prestonettes Inc. v. De Sputorno Coty*, 264 U. S. 359, 368, 68 L. Ed. 731, 741-2, 44 S. Ct. 350, 351; *United*

Drug Co. v. Rectanus Co., 248 U. S. 90, 97-8, 63 L. Ed. 141, 39 S. Ct. 48, 50-1.] It is quite plain, therefore, that a trademark furnishes no such connection between its owner and the goods to which it is affixed as to leave in him any right or interest in the goods after he has parted with title; from which it follows, that there is nothing upon which to base any justification for the grant to him of the power to control property that he no longer owns.

B. The Statute Is Arbitrary Because It Unnecessarily and Unreasonably Restricts the Right to Carry on Business by Methods Essentially Fair in Their Nature.

It has been previously noted that the alleged purpose of the Fair Trade Act is to eliminate the injurious consequences thought to follow from "predatory" price-cutting. The statute, however, is not so limited. All price-cutting, i. e., any sale below the standard fixed in any contract entered into in pursuance of section 1, is declared, in section 1½, to be "unfair competition" and, therefore, actionable. In adopting this method of approach, the act completely ignores the requirement, already adverted to [*ante*, p. 12], that the selected means shall have a real and reasonable relation to the object sought to be accomplished.

Successful competition, even when it is admittedly fair, produces damage in the sense that one dealer has lost custom to another. It is apparent, therefore, that the act may be availed of to interdict price competition as such, without regard to whether it is in fact "fair" or "unfair". It will not be contended, we suppose, that a method of doing business which is traditionally and essentially fair in its nature can be transformed into an act

of unfairness and illegality merely by characterizing it as the latter in some statute. [Compare, *Manley* v. *Georgia,* 279 U. S. 1, 6, 73 L. Ed. 575, 578, 49 S. Ct. 215, 217.] To determine whether a statute which purports to accomplish that transformation is constitutional or whether it prescribes an unreasonable restriction on the right to carry on an otherwise lawful business, the real nature of the prohibited conduct must be looked at. [See, *McFarland v. American Sugar Co.,* 241 U. S. 79, 86, 60 L. Ed. 899, 904, 36 S. Ct. 498, 501; *Jay Burns Baking Co. v. Bryan, supra,* 264 U. S., at 513, 68 L. Ed. at 826, 44 S. C. at 413, 32 A. L. R. at 664; *Meyer v. Nebraska, supra,* 262 U. S. at 399, 67 L. Ed. at 1045, 43 S. Ct. at 626-7, 29 A. L. R. at 1449-50. And compare, *A. L. A. Schecter Poultry Corp. v. United States,* 295 U. S. 495, 531-3, 79 L. Ed. 1570, 1580-1, 55 S. Ct. 837, 843-4, 97 A. L. R. 947, 957-9.]

In making such an inquiry, this Court, of course, may look to facts of common knowledge, for "Invalidity may be shown by things which will be judicially noticed. . . ." [*Weaver v. Palmer Bros. Co.,* 270 U. S. 402, 410, 70 L. Ed. 654, 656, 46 S. Ct. 320, 321. See, also: *Borden's Farm Products Co. v. Baldwin,* 293 U. S. 194, 209, 79 L. Ed. 281, 288, 55 S. Ct. 187, 191-2.] The ordinary methods of doing business, the existence of general trade practices and conditions, and the varying types of businesses, all fall within the category of matters judicially noticed. [*Nicol v. Ames,* 173 U. S. 509, 516-7, 43 L. Ed. 786, 792, 19 S. Ct. 522, 526; *Texas & P. R. Co. v. Pottorff,* 291 U. S. 245, 254, 78 L. Ed. 777, 782, 54 S. Ct. 416, 417; *Hardware D. Mut. F. Ins. Co. v. Glidden Co.,* 284 U. S. 151, 159, 76 L. Ed. 214, 219, 52 S. Ct.

69, 71; *Southern Ry. Co. v. United States,* 222 U. S. 20, 27, 56 L. Ed. 72, 75, 32 S. Ct. 2, 4; *Pennsylvania R. R. v. Sonman Shaft Coal Co.,* 242 U. S. 120, 127, 61 L. Ed. 188, 192, 37 S. Ct. 46, 49.]

Resorting to these permitted sources of knowledge, we think it can be shown that while some forms of price competition may, perhaps, be so destructive and unfair as to be subject to regulation, there are still forms of this competition which cannot be so described but which nevertheless are caught within the broad sweep of the challenged statute.

A difference in the price at which the same commodity is offered by various dealers may be, and frequently is, accounted for, not by the existence of a predatory or destructive intent, but by a difference in the method of conducting the business.[5] One dealer may sell for cash and render no services other than the sale of the article. Another may extend credit, accept telephone orders and orders on approval, deliver the goods to the purchaser's home and so forth. Again, one dealer may cater primarily to the wealthy who desire and are willing to pay for personal service, lavish surroundings and an atmosphere of exclusiveness, while another makes his appeal to people more modestly situated. One dealer may be located in a low or moderate rent district, another in a high rent

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5. The economic and statistical data upon which the statements to follow are based have been collected in the appendix to this brief. For the most part, no specific reference to these sources will be made in the general argument.

area. One may confine his operations to a single article or class of articles, the other extend his to many and varied lines.

All of these factors, and many more like them, necessarily have their effect on price. The result is a varying price level in respect of the same commodity—but it is a variation having nothing to do with the motives, and producing none of the consequences, which are thought to be found in "predatory" price-cutting. Certainly the dealer who charges less because he gives less cannot, in any realistic view, be said to be engaging in "unfair competition." [Compare, *Federal Trade Commission v. Gratz,* 253 U. S. 421, 427-8, 429, 64 L. Ed. 993, 996, 40 Sup. Ct. 572, 575; SELIGMAN AND LOVE, *Price Cutting and Price Maintenance,* pp. 114-5, *post* Appendix pp. 54-5; STEVENS, *Resale Price Maintenance as Unfair Competition,* 19 Columbia Law Review 265, 268-9, *post* Appendix pp. 53-4.]

The cost of doing business inevitably affects the price. The efficient and economical dealer who is able to maintain a proper margin of profit at a lower price than some other less efficient dealer, is not an unknown phenomenon. The costs of operation, all available data show, vary greatly not only as between different classes of business but even as between individual units within the same class, as well as in different localities within the state. In view of facts such as these, it would be a concept entirely foreign to our accepted ideas of competition to hold that the dealer who passes on his operation economies in the form of a lower price is competing "unfairly" with a dealer whose costs force him to charge more.

Nothing is more common in all lines of retail trade than the occasional, often seasonal, necessity of converting stock on hand into cash. The customary method of accomplishing that result is the "sale" at which all or selected lines of merchandise are offered at reduced prices for a limited period of time. There is nothing of predatory or destructive intent in such a practice. On the contrary, it is necessary and beneficial because it enables each individual dealer to adjust his business to unusual, as well as usual, variations in consumer demand. Frequently, it is the only method by which the merchant is able to raise the funds necessary to meet current obligations and to continue in business. Yet, a competitor, proceeding under the Fair Trade Act, could require it to be stopped. None of the exceptions contained in section 1 apply to such a situation since a "sale" under these circumstances would be neither a "close-out", a "damaged goods" nor a court sale.

To put the matter briefly, it is within the judicial knowledge of this Court that the mere fact of lower price is not always, or by itself, indicative of unfair or predatory competition; it may be, and frequently is, indicative of nothing more than efficient operation, alert merchandising, or minimum-service selling. The Fair Trade Act, however, by the simple expedient of denominating all sales below a price fixed in any contract between others "unfair competition", ignores these real differences in the nature of the general act which it prohibits and leaves it open to the producer or a competing dealer to compel cessation of the legitimate form of price-competition as well as the illegitimate.

The principle which governs a situation of this sort is succinctly stated in the following excerpt from *Tyson & Bro. v. Banton, supra,* 273 U. S. at 443, 71 L. Ed. at 728, 47 S. Ct. at 432, 58 A. L. R. at 1248:

> ". . . One vice of the contention is that the statute itself ignores the righteous distinction between guilt and innocence . . . and fixes the resale price as well where the evils are absent as where they are present. It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers may also be caught."

This is the principle which, in *Fairmont Creamery Co. v. Minnesota,* 274 U. S. 1, 71 L. Ed. 893, 47 S. Ct. 506, 52 A. L. R. 163, served to invalidate a statute very much like the one here in question. There the legislature had prohibited any discrimination in the prices paid for milk as between different communities or localities within the state. The evil aimed at by that statute was the destruction of competition brought about by the practice of powerful milk buyers paying excessive prices for the purpose of forestalling less powerful buyers. The statute, however, applied to all discriminations in the prices paid for milk, regardless of motive or intent. In that broad reach, the act was held to be unconstitutional because it had "no reasonable relation to the anticipated evil . . ." See, also, *Williams v. Standard Oil Co.,* 278 U. S. 235, 244, 73 L. Ed. 287, 310, 49 S. Ct. 115, 118, 60 A. L. R. 596, 605. And compare, *Central Lumber Co. v. South Dakota,* 226 U. S. 157, 57 L. Ed. 164, 33 S. Ct. 66, where a similar statute, properly limited in scope, was upheld.

Many instances of the application of this principle are to be found in the books. Thus, the perfectly proper purpose of preventing evasion of tax or regulatory statutes has several times been held not to justify such an extension of the restrictive provisions of the law as to bring within its reach persons not in fact guilty of the practices aimed at. [*Hoeper v. Tax Commission,* 284 U. S. 206, 216-7, 76 L. Ed. 248, 251-2, 52 S. Ct. 120, 122, 78 A. L. R. 346, 349; *Heiner v. Donnan,* 285 U. S. 312, 325, 327-8, 76 L. Ed. 772, 778, 780, 52 S. Ct. 358, 360; *Schlesinger v. Wisconsin,* 270 U. S. 230, 240, 70 L. Ed. 557, 564, 46 S. Ct. 260, 261, 43 A. L. R. 1224, 1227-8; *Weaver v. Palmer Bros., supra,* 270 U. S. at 414-5, 70 L. Ed. at 658, 46 S. Ct. at 323; *Jay Burns Baking Co. v. Bryan, supra,* 264 U. S. at 513, 516-7, 68 L. Ed. at 826, 828, 44 S. Ct. at 414-15, 32 A. L. R. at 664, 666; *Railroad Retirement Board v. Alton R. Co., supra,* 295 U. S. at 348-9, 389, 79 L. Ed. at 1475-6, 1497, 55 S. Ct. at 762, 779-80.]

Nor does the fact that abuses or evils exist in connection with certain classes of otherwise harmless business warrant the complete prohibition of the right to carry on that business, or the imposition of unnecessary and unreasonable restrictions upon its operation. The evils may be the subject of appropriate regulation, but the conduct of the business by non-injurious methods cannot be enjoined. [*Louis K. Liggett Co. v. Baldridge, supra,* 278 U. S. at 112-3, 73 L. Ed. at 208-9, 49 S. Ct. at 59; *Ribnik v. McBride,* 277 U. S. 350, 358 72 L. Ed. 913, 916, 48 S. Ct. 545, 547; *New State Ice Co. v. Liebmann,* 285 U. S. 262, 278-80, 76 L. Ed. 747, 754, 52 S. Ct. 371, 374-5; *Adams v. Tanner,* 244 U. S. 590, 594, 61 L. Ed. 1336, 1343, 37 S. Ct. 662, 664.]

The application of the principle exemplified by the foregoing decisions is not prevented, in the case at bar, by appellee's suggestion, made below, that since the appellant is charged with price-cutting for "the purpose of interfering with, and disrupting, plaintiff's said contracts and business .. . ." [R. 4], it is in no position to raise the question. The relief allowed under the statute is not dependent in any way on pleading or proof of any such purpose; it may be had as well when that or any similar purpose is absent as when it is present. In either event, the appellant is entitled to have the constitutionality of the statute tested by its operation and effect. [*Near v. Minnesota ex rel. Olson,* 283 U. S. 697, 708-9, 723, 75 L. Ed. 1357, 1363-4, 1371, 51 S. Ct. 625, 628, 633.] In other words, constitutionality is to be tested by what may be done under the authority of the statute, not necessarily by what has actually been done; and in determining what may be done, the Court is not confined to the facts of the case before it. [*Eubank v. Richmond, supra,* 226 U. S. at 144, 57 L. Ed. at 159, 33 S. Ct. at 77, Ann. Cas. 1914B, at 194, 42 L. R. A. (N. S.) at 1126; *Bailey v. Alabama,* 219 U. S. 219, 235, 238, 244-5, 55 L. Ed. 191, 199, 200, 202, 31 S. Ct. 145, 149, 153. And compare, *Tumey v. Ohio,* 273 U. S. 510, 533, 71 L. Ed. 749, 759, 47 S. Ct. 437, 445, 50 A. L. R. 1243, 1255-6; *Coe v. Armour Fertilizer Works,* 237 U. S. 413, 423-4, 59 L. Ed. 1027, 1031, 35 S. Ct. 625, 628-9; *Miller v. Horton,* 152 Mass. 540, 546, 26 N. E. 100, 102, 23 Am. St. Rep. 850, 855, 10 L. R. A. 116, 118, per Holmes, J.]

In this connection, it is not without significance that, notwithstanding the general averment of appellant's purpose, there is no allegation that the appellant indulged in

either of the practices said to be specially aimed at by the Fair-Trade Act. There is no charge either of "leader" or "loss leader" merchandising or of selling below cost; nor is there any allegation that the price charged by appellant was unreasonably or unnecessarily low. Presumably appellee pleaded the strongest case open to it. [*Higgins v. Security Trust etc. Bank,* 203 Cal. 398, 401, 264 Pac. 744, 745-6.] It follows, therefore, that appellant must be deemed not to have done these things with which the statute is supposed particularly to deal, and in consequence, that it is directly within the class of innocent persons whose rights are infringed by the statute.

C. The Act Is in Effect a Price-fixing Statute and as Such Is Arbitrary and Beyond the Power of the Legislature.

It may or may not be true, as was suggested by the state Supreme Court, that the Fair Trade Act does not aim primarily at regulating prices. It cannot be denied, however, that the act seeks to accomplish whatever purpose it has by the method of fixing and enforcing minimum resale-price levels. In necessary effect, therefore, it is a price-fixing statute and its validity must be determined on that footing. [*Fairmont Creamery Co. v. Minnesota, supra,* 274 U. S. at 8-9, 71 L. Ed. at 896-7, 47 S. Ct. at 508, 52 A. L. R. at 167; *Doubleday-Doran & Co. Inc. v. R. H. Macy & Co., supra,* 269 N. Y. at 281, 199 N. E. at 411; *Johnson & Johnson v. Weissbard, supra,* 184 Atl. at 787, 788-9.]

Prior to the decision in *Nebbia v. New York, supra,* it was pretty definitely established that the power of the state to fix or regulate the price at which ordinary com-

modities might be sold was limited to businesses affected with a public interest. [*Tyson & Bro. v. Banton, supra,* 273 U. S. at 430, 71 L. Ed. at 722, 47 S. Ct. at 428, 58 A. L. R. at 1241; *Wolff Packing Co. v. Court of Industrial Relations, supra,* 262 U. S. at 535-8, 67 L. Ed. at 1108-9, 43 S. Ct. at 632-4, 27 A. L. R. at 1287; *Williams v. Standard Oil Co., supra,* 278 U. S. at 239-40, 73 L. Ed. at 308, 49 S. Ct. at 116, 60 A. L. R. at 602; *Ribnik v. McBride, supra,* 277 U. S. at 355-6, 72 L. Ed. at 915, 48 S. Ct. at 545-6; *German Alliance Ins. Co. v. Kansas,* 233 U. S. 389, 406, 58 L. Ed. 1011, 1019-20, 34 S. Ct. 612, 617; *Budd v. New York,* 143 U. S. 517, 533-4, 36 L. Ed. 247, 252, 12 S. Ct. 468, 471-2; *Munn v. Illinois,* 94 U. S. 113, 125-30, 24 L. Ed. 77, 84-6.] In the *Nebbia* case, however, it was said that the phrase "affected with a public interest" meant nothing more than "subject to the police power" and that, accordingly, it remained the function of the courts "to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory." The prior decisions which might be thought to have indicated a somewhat different approach were explained as resting "finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect." [*Nebbia v. New York, supra,* 291 U. S. at 536-7, 78 L. Ed. at 956-7, 54 S. Ct. at 515-6, 89 A. L. R. at 1483.]

Since that decision the statute there sustained has been characterized as "a temporary expedient to redress an injurious economic condition . . ." [*Borden's Farm Products Co. v. Ten Eyck,* 297 U. S. 251, 261, 80 L. Ed.

(Adv. Ops.) 469, 472, 56 S. Ct. (Adv. Ops.) 453, 455], and the authority of a prior decision advancing the public interest formula has been availed of to invalidate a law fixing minimum wages for women. [*Morehead v. People ex rel. Tipaldo,* 298 U. S. ....., 80 L. Ed. (Adv. Ops.) 921, 926, 929-30, 56 S. Ct. (Adv. Ops.) 918, 923, 926.]

In this state of the authorities it is proper to say, we believe that, emergencies apart, the privilege of the ordinary trader to fix his own price is still beyond the regulatory power of the state except where the business is one affected with a public interest, or where special circumstances surrounding a particular business reasonably require that special form of regulation. The mere fact, therefore, that price-fixing has been sustained in any particular case does not mean that the same type of regulation will be permitted in respect of some other business or even of the same business under different circumstances. [*Nebbia v. New York, supra,* 291 U. S., at 525, 536, 78 L. Ed. at 950, 956, 54 S. Ct. at 510, 515, 89 A. L. R. at 1476, 1482; *Darweger v. Staats,* 267 N. Y. 290, 308, 196 N. E. 61, 67.]

Thus, for instance, in *Munn v. Illinois, supra,* the essential nature of the service rendered by grain elevators and their peculiar situation which permitted them to dominate the entire process of marketing grain, sufficed to create such a public interest as would justify rate regulation. Similarly, in *German Alliance Ins. Co. v. Kansas, supra,* the social necessity for insurance, the interdependent nature of that business, the extreme importance of the premium rate as a factor in the calculations upon which the insurer's ability to comply with his contract de-

pended, and the absence of ordinary bargaining as an element in the process of fixing the premium, made the matter one of sufficient interest to the public to warrant regulation of prices. In *Nebbia v. New York, supra,* price-fixing as a "temporary expedient" was thought warranted because milk was an essential commodity, low prices threatened a relaxation of vigilance against contamination, the business was of paramount importance to the economic and credit structure of the state as a whole, and the peculiar make-up of the business tended to instability of prices if the price term of the contract was left to the ordinary play of the law of supply and demand.

On the other hand, in the cases in which price-regulation was not sustained, the absence of any elements touching the public interest, such as those noticed above, resulted in a finding that the various statutes were arbitrary restrictions on the right to carry on a lawful business. The situation in the instant case falls much more nearly within the principle of this last group of decisions than those in which price-fixing was upheld. There is no element of emergency, of an essential commodity, of a business vital to the state's economic existence, or of anything of like purport in the instant case. There is only the bare fact that as to a business dealing in an ordinary and far from essential commodity the price to be charged the public, at least the minimum price which may be charged, is to be fixed by persons other than the seller. Nowhere is there any suggestion of such a relation to the public welfare as might justify this limitation upon the ordinary trader's right to run his business in his own way. That abuses of this right exist and produce injury is no justification; for while this fact may be suf-

ficient to warrant legislation hitting directly and only at those abuses, it will not uphold legislation which goes beyond the necessities of the occasion by restricting and in effect destroying a valuable attribute of the right to do business at all. [*Tyson & Bro. v. Banton, supra,* 273 U. S. at 442-3, 71 L. Ed. at 728, 47 S. Ct. at 432, 58 A. L. R. at 1248; *Ribnik v. McBride, supra,* 277 U. S. at 358, 72 L. Ed. at 916, 48 S. Ct. at 547.]

The arbitrary character of the Fair Trade Act is further emphasized by the fact that it is a universal, undiscriminating requirement of price-fixing in all businesses in which branded goods are sold—which means, of course, in virtually all business. No decision of this court has gone so far in sustaining price-fixing legislation. The category of businesses which may be constitutionally subjected to price-regulation is not a closed one—but whether or not any specific business is within that category is a question to be determined upon the special facts relating to it. The Fair Trade Act, however, completely ignores the obvious fact that all businesses are not alike either in their internal make-up or in their relation to the community at large, and that this circumstance must play an important role in any decision on price-fixing legislation.

To sustain the Fair Trade Act as a price-fixing measure it would be necessary to repudiate the principle, recognized in every decision of this Court on the subject, that all businesses and all ordinary commodities are not necessarily so situated as to require or justify price control. What-

ever the price-fixing power of the state may be, it certainly is not an unlimited and all-embracing power available in all cases and under all circumstances. The Fair Trade Act, however, is postulated on the contrary assumption, and because of that fact it transcends the limits of the Fourteenth Amendment.

D. The Statute Cannot Be Defended as a Codification or Extension of the Common Law.

It was suggested below that the Fair Trade Act was no more than a statutory extension of the common law doctrine of unjustifiable interference with contracts. [*Max Factor & Co. v. Kunsman, supra,* 91 Califoria Decisions at 356, 55 P. (2d) at 185, Jurisdictional Statement, p. 30.] In point of fact, however, the statute goes far beyond the broadest limits of this doctrine, and while that circumstance does not necessarily stamp the act as unconstitutional it does demonstrate that its constitutionality must be determined on its own footing.

To bring the common law rule of interference with contracts into operation there must be an intentional interference, a proximately resulting breach of contract, and an absence of justification. Competition—at least the ordinary competition of trade—is a complete justification within the meaning of this rule. [*Passaic Print Works v. Ely* (C. C. A. 8), 44 C. C. A. 426, 105 Fed. 163 (certiorari denied, 181 U. S. 617, 45 L. Ed. 1029, 21 S. Ct. 922); *Beardsley v. Kilmer,* 236 N. Y. 80, 140 N. E. 203, 27 A. L. R. 1411; *Katz v. Kapper,* 7 Cal. App. (2d) 1, 44 P. (2d) 1060; *Boyson v. Thorn,* 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233; *Martell v. White,* 185 Mass. 260, 69 N. E. 1087, 102 Am. St. Rep. 346, 64

L. R. A. 263; *Sorrell v. Smith* [1925], App. Cas. 700; *Sweeney v. Smith* (C. C.), 167 Fed. 385, 386-8, affirmed (C. C. A. 3) 171 Fed. 645, certiorari denied, 215 U. S. 600, 54 L. Ed. 343, 30 S. Ct. 400; *Lamport v. 4175 Broadway, Inc.*, 6 F. Supp. 923, 924.] Under the Fair Trade Act, however, it is clear that price-cutting as such is actionable even though it be done in the course of ordinary competition and without any intent to interfere with, or induce the breach of, another dealer's contract, and even though no breach of any contract be in fact induced. Obviously, the statute was intended to reach, and it does reach, far beyond the boundaries of the common law in this respect.

It has also been suggested below, by counsel for appellee, that the act might be sustained as merely an extension to chattels of the doctrine of equitable servitudes. Here it cannot be claimed that the common law goes so far since manifestly it does not. [*Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 404-5, 55 L. Ed. 502, 517-8, 31 S. Ct. 376, 383; *John D. Park & Sons Co. v. Hartman* (C. C. A. 6), 82 C. C. A. 158, 172-3, 153 Fed. 24, 38-9, 12 L. R. A. (N. S.) 135, 145-6; *Garst v. Hall & Lyon*, 179 Mass. 585, 590-1, 61 N. E. 219, 220, 55 L. R. A. 631, 637-8; *Dunlop Pneumatic Tyre Co. Ltd v. Selfridge & Company, Ltd.* [1915], App. Cas. 847; *Taddy & Co. v. Sterious & Co.* [1904], 1 Ch. 354, 358; *McGruther v. Pitcher* [1904], 2 Ch. 306.] Even the application, by analogy, of the doctrine as it exists in respect of land would not cover the whole field to which the Fair Trade Act extends. Upon such an analogy it would be necessary that the *specific chattels* in question should have been originally restricted

as to their resale price, that the subvendee sought to be charged should have taken them with knowledge of the restriction, and that the one imposing the servitude should be the owner of a dominant tenement to be benefited. [See, generally, ZECHARIAH CHAFEE, JR., *Equitable Servitudes on Chattels,* 41 Harvard Law Review 945.]

None of these conditions need exist as a prerequisite of relief under the Fair Trade Act. The commodity offered at the cut-price may have been sold by the producer in the first instance without restriction as to resale price;[6] or the price-cutter may have purchased it without knowledge of any restriction. Yet, if at the time of any resale he knows that in some contract between the producer and another the minimum resale price of the same brand of commodity has been fixed, he is bound by that price. It is also difficult, in the ordinary situation comprehended by the statute, to discover any dominant tenement for the benefit of which the restriction is imposed.

Here, again, it is well to repeat that the mere fact that the Fair Trade Act is much broader in scope than the common law or equitable doctrines cited does not establish it as unconstitutional. By the same token, however, the constitutionality of the statute cannot be defended simply upon the ground that it is a codification, directly or by analogy, of existing common law or equitable principles. Going, as it does, far beyond these principles, its validity must be tested by other considerations entirely.

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6. Presumably that was the situation in the case at bar since the contrary was not alleged.

II.

The Fair Trade Act Denies Appellant the Equal Protection of the Laws.

Prior to the enactment of the Fair Trade Act, a system of agreements by which the resale price of any article of commerce was fixed would have been void in California as violative of the state's anti-trust law. [*Cartwright Act*,[7] Calif. Stats., 1907, c. 530, p. 984, sec. 1; Calif. Stats., 1909, c. 362, p. 593, sec. 1; Deering's General Laws of California, Act 8702, p. 4902, sec. 1. *People v. H. Jevne & Co.*, 179 Cal. 621, 178 Pac. 517.] By virtue of the Fair Trade Act such agreements, in respect of articles bearing, or the labels or content of which

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7. The relevant provisions of this statute are as follows:

> "A trust is a combination of capital, skill or acts by two or more persons . . . for either, any or all of the following purposes:
>
> "1. To create or carry out restrictions in trade or commerce.
>
> "2. To . . . increase the price of merchandise or of any commodity.
>
> "3. To prevent competition in . . . sale or purchase of merchandise, produce or any commodity.
>
> "4. To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity . . . intended for sale, barter, use or consumption in this state.
>
> "5. To make or enter into or execute or carry out any contracts . . . . by which they shall bind themselves not to sell . . . any article . . . below a common standard figure, or fixed value, or

bear, the trademark, name or brand of the producer, are exempted from the provisions of the anti-trust law. [Sec. 1, *ante*, p. 7.] Similar agreements in respect of any other article of commerce are unaffected by this exemption.

There is, therefore, a plain discrimination between dealers who sell articles falling within the purview of the Fair Trade Act and other classes of dealers. The former may be restricted in their privilege of fixing their own prices, by agreements to which they are not parties, while the latter cannot be so limited in their freedom. Such a discrimination is a denial to the first class of dealers (within which class comes the appellant) of the

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by which they shall agree in any manner to keep the price of such article . . . at a fixed or graduated figure . . . so as to directly and indirectly preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale . . . of any such article. . . . Every such trust as is defined herein is declared to be unlawful. against public policy and void, . . ."

Grogan v. Chaffee, 156 Cal. 611, 105 Pac. 745, 27 L. R. A. (N. S.) 395, and *Ghirardelli Co. v. Hunsicker*, 164 Cal. 355, 128 Pac. 1041, are sometimes cited for the proposition that resale price maintenance agreements were valid in California even before the Fair Trade Act. The *Cartwright Act*, however, changed this rule. The *Grogan* case arose before the *Cartwright Act*, while in the *Ghirardelli* case, which came up on the pleadings, facts (not appearing in the case at bar) were averred that brought the case within one of the exceptions contained in the anti-trust law.

equal protection of the laws. [*Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 556-64, 46 L. Ed. 679, 688-92, 22 S. Ct. 431, 438-41.]

Classification, of course, is perfectly consistent with the Fourteenth Amendment, but only if it is based upon differences between the selected classes having a direct and rational connection with the subject-matter and purpose of the statute in question. [*Smith v. Cahoon*, 283 U. S. 553, 566-7, 75 L. Ed. 1264, 1274, 51 S. Ct. 582, 587; *Southern Ry. Co. v. Greene*, 216 U. S. 400, 417, 54 L. Ed. 536, 541, 30 S. Ct. 287, 291; *Truax v. Corrigan*, 257 U. S. 312, 337-8, 66 L. Ed. 254, 265, 42 S. Ct. 124, 131; *Atchison etc. Ry. Co. v. Vosburg*, 238 U. S. 56, 59, 59 L. Ed. 1199, 1200, 35 S. Ct. 675, 676; *Frost v. Corporation Commission*, 278 U. S. 515, 522-3, 73 L. Ed. 483, 488-9, 49 S. Ct. 235, 238.] Consequently, it may be permissible, under certain circumstances, to classify as between dealers having a well-known or well advertised trade name and those who do not. [*Borden's Farm Products Co. v. Ten Eyck, supra.*] But the classification challenged here does not meet the requirements of these decisions.

The only difference between the two classes marked out by the Fair Trade Act is that the articles in one class bear the trademark, name or brand of the producer, whereas those in the other class do not. The dividing line is not between well-known articles, or articles whose trademark or brand has acquired a distinctive meaning, on the one hand, and articles not having that attribute,

on the other. Yet, keeping in mind that the purpose of the statute is to protect the producer's interest in the mark or name and the goodwill which he has built up, which necessarily implies an association by the public of the name and the commodity, it seems plain that some such discrimination should have been made.[8]

Almost any sort of commodity may be sold with the producer's name on it or its container. It does not follow from this fact alone that the name or the commodity has acquired such a reputation as to make it adaptable to "leader" merchandising or subject to the injurious effects which are said to result from that form of selling. Articles bearing the producer's name may, so far as the purpose of the Fair Trade Act is concerned, be no different from similar articles sold without the name affixed to them,—at least until something approaching the "secondary meaning" of trademark law has been acquired. Yet it is the mere circumstance of name or brand, without regard to its association in the public mind with the article to which it is appended, that furnishes the boundary between the exempted and non-exempted classes. Such a classification, we submit, is arbitrary.

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8. Something of this sort is hinted at by the title of the statute which refers to "the distribution of articles of standard quality under a *distinguished* trademark, brand or name." [Ante, p. 7. Italics ours.] The suggested distinction was not carried into the substantive provisions of the act.

Conclusion.

The majority opinions of the state Supreme Court, it will be seen on reading, are devoted almost entirely to establishing the proposition that it is within the power of the legislature to declare the state's economic policy and that consequently it is permissible to impose restrictions on free competition when it may be reasonably supposed that the public welfare requires them. This general *dictum,* even if true, cannot sustain the specific statute challenged here. Legislation of the scope and character of that statute is beyond the power of the legislature. A legitimate end cannot be reached by unconstitutional means. For the reasons indicated we believe the Fair Trade Act to be arbitrary and without the limits imposed by the Fourteenth Amendment. We respectfully submit, therefore, that the judgment of the Supreme Court of California should be reversed.

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APPENDIX.

I.

Variations in Average Cost of Doing Business.

The cost of doing business varies greatly with different types of business, with different units in the same business, and in different localities within the same state.

A. Different Kinds of Business.

(1) Fifteenth Census of the United States, *Distribution,* Vol. 1, *Retail Distribution,* Part 1, p. 21.

"Expenses vary greatly with different kinds of business. . . . Expenses also vary considerably in different sections of the country, as shown by comparison of State Averages, and they increase with the size of the city."

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(2) Encyclopedia of the Social Sciences, Vol. 13, pp. 353, 354.

". . . Expenses of operation within the various types of retail establishments vary considerably as a result of difference in the amount of handling required, in amounts of capital invested, in risks involved and in other services. The lowest operating expenses are as a rule to be found in those types rendering the fewest services and handling the goods with the most rapid turnover and with the lowest capital investments. . . . The highest operating expenses are to be found in retail establishments required to render a great deal of service. . . .

". . . . Retail operating expenses in the same type of stores, offering the same services, are generally lower

in smaller towns and higher in large cities. Similarly, operating expenses tend to increase on passing from stores in neighborhood and suburban centers to central locations in the same cities. . . ."

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(3) The following table shows the average expense of operation (expressed in percentages of total sales) for various kinds of business. The averages given are for the United States as a whole, for the state of California, and for the cities of Los Angeles and San Francisco. The data are taken from the FIFTEENTH CENSUS OF THE UNITED STATES, *Distribution,* Vol. 1, *Retail Distribution,* Part 1, pp. 51-3; Part 2, pp. 158-60, 194-6, 212-14. Only a part of the businesses reported in the Census are included in this table.

Business	*U. S.*	*Calif.*	*L. A.*	*S. F.*
Food Group	19.50	19.94	21.65	21.78
Candy-Nut Stores	38.40	45.40	48.17	46.56
Candy and Fountain	32.78	37.74	36.95	41.96
Dairy Product Stores	19.82	28.79	27.79	19.47
Grocery, without meats	17.36	17.31	18.03	17.77.
Grocery, with meats	15.78	15.75	17.81	19.25
Meat Markets	18.96	20.67	23.62	18.97
Meat, with groceries	17.21	18.16	20.47	19.55
General Food Stores	24.16	26.35	26.43	25.11
Bottled Waters and Beverages.	46.10	48.77	52.42	66.92
General Stores	13.59	16.69	.....	14.11
Grocery, with apparel	14.74	17.58	18.36	11.82
Grocery, with dry goods	14.53	16.06	18.36	20.33

Business	*U. S.*	*Calif.*	*L. A.*	*S. F.*
General Merchandise Group	26.81	28.71	29.70	30.14
Department Stores, without food	29.25	31.06	32.19	31.64
Department Stores, with food	28.19	25.86	25.56	.....
Dry Goods Stores	24.21	27.78	28.61	29.27
General Merchandise, with food	16.17	21.63	.....	17.22
General Merchandise, without food	21.66	24.69	41.46	23.96
Automotive Group	22.06	23.06	23.14	23.25
Accessory Stores	28.34	28.85	28.05	30.00
Filling Stations	23.68	27.76	31.15	26.87
Filling Stations, with accessories	22.87	24.25	25.60	27.71
Garages	44.58	52.49	59.75	54.96
Apparel Group	30.64	34.45	35.26	36.62
Men's Clothing Stores	27.28	29.78	27.93	33.27
Men's Hat Stores	36.56	42.33	47.54	37.37
Men's Clothing and Furnishings	28.71	30.86	32.39	31.67
Hosiery	32.31	41.18	37.43	51.13
Men's Shoe Stores	31.04	36.62	34.21	37.42
Women's Shoe Stores	30.05	35.20	33.53	40.20
Family Shoe Stores	29.09	33.04	32.34	34.45
Furniture and Household Group	32.51	36.42	40.23	36.13
Lumber and Building Group	25.99	25.37	23.78	30.10

Business	*U. S.*	*Calif.*	*L. A.*	*S. F.*
Other Retail Stores	27.00	29.34	30.89	36.11
Hardware Stores	26.63	28.74	29.29	34.19
Book Stores	32.46	31.84	33.01	34.70
Cigar Stores, with fountains	31.22	33.84	40.06	29.27
Cigar Stands	42.46	44.41	47.01	59.38
Cigar Stores, without fountains	27.38	31.03	27.17	33.48
Drug Stores	27.21	27.65	23.08	30.69
Drug Stores, with fountains	27.05	27.55	28.53	31.68

(4) Later data collected by the U. S. Census Bureau show the same general variations as are disclosed above. See, U. S. BUREAU OF THE CENSUS, *Census of American Business, Retail Distribution* (1933), Vol. 1, p. A-5, Vol. 2, pp. 60-71.

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(5) The same standard commodity may be sold by many different classes of retailers, each class having a different operation cost.

(a) FEDERAL TRADE COMMISSION, *Report on Resale Price Maintenance,* Part II, p. 136.

". . . Today most products are handled by various types of retailers. Foods, drugs and hardware items are likely to be handled to some extent by drug stores, grocers, department stores, dry-goods stores, specialty stores, and general stores. Other items—for example, electrical

goods and mechanical household equipment—are to be found in the stocks of hardware stores, department stores, furniture and house furnishing stores, and specialty stores, including the merchandising departments of public-utility companies. Then, further, within each general class of merchants there are those pursuing different methods of merchandising. There are the independent merchant or individual store owner and the chain store, the service retailer giving credit and delivery, and the cash-and-carry retailer. . . ."

(b) HARING, *Retail Price Cutting,* pp. 39-41.

"The ordinary manufacturer of trade-marked merchandise does not obtain complete distribution through one type of retailer. Chewing gum is sold through innumerable outlets. Candy bars appear in drug stores, grocery stores, variety stores, and garages. Sandwiches are now handled in drug stores, and 5¢ and 10¢ stores as well as lunchrooms. A hardware store may take on a sideline of ice cream; a drug store may sell nails; super-service filling stations may almost be classed as general stores.

"This situation is very important from the standpoint of resale prices because the costs of doing business vary with each different type of outlet. . . .

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"Costs of doing retail and wholesale business differ between types of outlets (grocery and drug stores), be-

tween types of stores in the same general classification (chain and independent grocery stores), and between individual stores (efficient and inefficient independent grocery stores). . . ."

(c) To the same general effect see: GRETHER, *Resale Price Maintenance in Great Britain, With an Application to the Problem in the United States,* University of California Publications in Economics, Vol. II, at pp. 329-32; and, HILL AND SCOTT, *Competition Between Different Types of Retail Outlets in Selling the Same Commodity,* 11 Harvard Business Review, 519.

B. WITHIN THE SAME KIND OF BUSINESS.

(1) FIFTEENTH CENSUS OF THE UNITED STATES, *Distribution,* Vol. 1, *Retail Distribution,* Part 1, p. 21.

"Group averages, which must be very general at best, as is true of all expense averages shown in the census report, do not show the extreme variation which exists between different kinds of stores, or why some retailers can operate at a ratio as small as 11 per cent. while others require more than 50 per cent.

"The variation depends largely upon factors of value of the unit of sale, extent of conversion or processing, or the addition of service, individual attention required in selling, technical or popular knowledge of the merchandise, cost of delivery, installation and maintenance, degree of specialization of the lines carried, proportion of related commodities sold and efficiency of management. . . ."

(2) The following tables show the high, low and average operating expenses (expressed in percentage of total sales) of different units within the same line of business. The figures are taken from FEDERAL TRADE COMMISSION, *Report on Resale Price Maintenance*, Part II, pp. 85, 87, 89, 91, 92, 94.

(a) *Drug Stores*

Sales	*Stores Reporting*	*High*	*Low*	*Average*
$200,000 and over	8	39.3	15.7	29.9
$100,000 to $200,000	22	56.4	20.4	29.9
$70,000 to $100,000	24	42.9	15.1	29.3
$50,000 to $70,000	31	43.1	9.6	27.5
$40,000 to $50,000	31	41.0	10.0	26.7
$30,000 to $40,000	44	44.9	11.1	24.4
$25,000 to $30,000	34	35.4	8.8	21.7
$20,000 to $25,000	47	37.0	7.1	22.0
$15,000 to $20,000	45	39.8	7.0	22.1
$10,000 to $15,000	22	50.7	7.5	21.3
Under $10,000	11	55.3	6.9	20.7
All groups	319	56.4	6.9	27.3

(b) *Grocery Stores*

Sales	*Stores Reporting*	*High*	*Low*	*Average*
$100,000 and over	20	25.9	5.2	18.9
$50,000 to $100,000	22	24.5	6.5	14.2
$25,000 to $50,000	27	23.3	6.6	13.0
Under $25,000	11	16.9	2.9	10.8
All groups	80	25.9	2.9	17.6

(c) *Stationery Stores*

Sales	*Stores Reporting*	*High*	*Low*	*Average*
$500,000 and over	4	37.0	20.7	28.8
$100,000 to $500,000	18	50.6	20.1	34.8
Under $100,000	10	53.7	21.3	36.8
All groups	32	53.7	20.1	32.3

(d) *Jewelry Stores*

Sales	*Stores Reporting*	*High*	*Low*	*Average*
$100,000 and over	11	47.0	20.4	35.3
$50,000 to $100,000	11	56.3	32.2	42.8
$25,000 to $50,000	7	45.0	22.6	34.2
Under $25,000	9	49.2	6.5	35.4
All groups	38	56.3	6.5	36.5

(e) *Dry Goods Stores*

Sales	*Stores Reporting*	*High*	*Low*	*Average*
$500,000 and over	4	35.0	26.1	30.2
$100,000 to $500,000	13	42.6	22.4	29.2
$50,000 to $100,000	12	39.0	21.6	30.8
Under $50,000	11	47.1	5.5	22.7
All groups	40	47.1	5.5	29.7

(f) *Department Stores*

Sales	*Stores Reporting*	*High*	*Low*	*Average*
$1,000,000 and over	27	35.2	20.0	27.6
$500,000 to $1,000,000	11	35.1	19.8	28.2
Under $500,000	12	32.6	17.6	26.0
All groups	50	35.2	17.6	27.6

(3) A survey of retail drug stores in St. Louis, conducted by the U. S. Department of Commerce in 1931, revealed that in one group of seven independent drug stores total operating expense varied from 26.6% to 38.6% of net sales; and in another group of thirteen, the expense ratios ranged from 26.2% to 43.1% of net sales. [U. S. DEP'T OF COMMERCE, *Costs, Sales and Profits in the Retail Drug Store,* Domestic Commerce Series No. 90, pp. 23, 110.]

A survey of Louisville grocery stores, made by the same department, showed expense ratios from 12.7% to 48.7%. [U. S. DEP'T OF COMMERCE, *Merchandise Characteristics of Grocery Store Commodities;* Distribution Cost Study, No. 13, p. 23.]

An extensive and recent investigation into the subject of retail operating costs and profits has been made by Dun & Bradstreet, Inc. Illustrative figures from this survey are: In 1934 the operating expenses of 129 cigar and cigarette dealers ranged from 8.45% to 35%; for 1078 drug stores the range was from 25.20% to 42.04%, and

for 104 bookdealers the variation was from 21.5% to 42%. [DUN & BRADSTREET, *Retail Survey,* 1934.]

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(4) MURCHISON, *Resale Price Maintenance,* Columbia Univ., Studies in History, Economics and Public Law, Vol. 82, No. 2, pp. 54, 56.

". . . These reports [of the Harvard School of Business Administration] indicate that retail grocers do business at an average cost of 16.5% of net sales, and that their net profits vary from 2½% to 5½%. The standard of deviation for the cost figures was rather high, the figures ranging from 10.4% to 25.2%. The average gross profit, that is, the difference between net sales and the cost of their stock, was found to be 21%. The variation is from 14.6% to 28%.

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". . . as between retailers of any given type of goods, there are to be found the same variations in the cost of doing business as are found among grocers. . . ."

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(5) CONVERSE, *Elements of Marketing* (1935), p. 881:

"Different stores have different operating expenses. Stores in small towns have lower expenses than stores in large towns. Efficient stores have lower expenses than inefficient stores. . . ."

II.

Variations in Selling Price of Same Commodity.

The same commodity is frequently sold, within the same city or locality, at different prices for reasons having no necessary connection with "predatory" price cutting.

A. Variations in Price.

(1) The following table shows the results of a survey of the selling prices of 47 standard commodities, made in New York City in connection with the Seligman and Love investigation. The data have been compiled from Seligman and Love, *Price Cutting and Price Maintenance,* Appendix One, pp. 361-2. The table shows the number of stores reported, and the number selling each commodity in each price group. The price groups are classified in terms of percentage of the list price.

Product	*Total Stores*	45%-55%	55%-65%	65%-75%	75%-85%	85%-95%	95%-100%
Food Drink	160	2	12	56	33	32	25
Shaving Cream 1	116	0	0	0	2	30	84
Shaving Cream 2	181	8	12	41	42	17	61
Shaving Cream 3	190	0	4	30	20	54	82
Antiseptic 1	189	0	7	12	146	2	22
Antiseptic 2	184	0	1	13	75	69	26
Antiseptic 3	188	0	0	7	57	59	65
Baby Powder	169	2	38	5	40	14	70
Dental Cream 1	196	15	124	32	12	0	13
Dental Cream 2	193	0	49	41	76	0	27
Dental Cream 3	193	0	45	56	66	13	13
Dental Cream 4	186	0	18	61	19	32	66

Product	*Total Stores*	45%-55%	55%-65%	65%-75%	75%-85%	85%-95%	95%-100%
Sanitary Napkin	186	0	41	15	44	68	18
Tooth Brush 1	178	4	14	22	68	43	27
Tooth Brush 2	181	4	10	26	65	44	32
Skin Lotion 1	156	0	0	0	35	69	52
Skin Lotion 2	189	2	9	73	38	42	25
Skin Lotion 3	190	0	9	23	87	50	21
Headache Remedy	185	0	34	50	83	5	13
Face Powder	189	0	6	51	48	66	18
Face Cream 1	127	0	1	1	18	38	69
Face Cream 2	158	8	29	36	66	3	16
Disinfectant	144	0	0	4	34	73	33
Ointment 1	193	0	9	95	61	15	13
Ointment 2	180	0	0	2	25	89	64
Ointment 3	191	0	62	88	3	22	16
Ointment 4	189	0	2	108	22	37	20
Laxative 1	181	0	29	44	74	13	21
Laxative 2	160	0	10	19	79	24	28
Laxative 3	188	0	0	3	36	40	109
Laxative 4	178	1	106	46	1	8	16
Blood Tonic	110	0	0	3	29	37	41
Cold Remedy 1	189	1	17	13	147	0	11
Cold Remedy 2	190	2	12	9	149	0	18
Cough Remedy	192	0	6	38	92	37	19
Liver Pills	184	0	12	24	81	21	46
Eye Wash	143	0	2	14	75	45	7
Cod-Liver Oil 1	176	0	7	91	51	10	17
Cod-Liver Oil 2	175	0	8	41	61	45	20
Mineral Oil 1	189	2	48	50	46	26	17
Mineral Oil 2	192	2	32	83	46	5	14
Mineral Oil 3	192	0	37	62	68	11	14
Milk Sugar 1	176	0	4	95	39	20	18
Milk Sugar 2	167	29	34	74	15	4	11
Milk of Magnesia	195	0	43	45	67	26	14
Shampoo	181	8	114	31	16	3	9
Liniment	189	0	1	116	24	27	21

(2) COVER, *Retail Price Behavior,* University of Chicago School of Business, Studies in Business Administration (1935), Vol. V, No. 2, pp. 3, 15:

"Prices vary by kind of store, type of operation, service rendered, degree of competition between chain and independent stores, and location with respect to central shopping areas. . . .

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"It is common knowledge that prices vary for the same commodity both between regions and within a city. A given brand of cigar will vary in Washington from 15 to 20 cents, while a box of the same cigars vary from $3.75 to $4.00. . . ."

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(3) NATIONAL INDUSTRIAL CONFERENCE BOARD, INC., *The Cost of Living in the United States,* 1914-1930, p. 29:

"Retail prices at any given time vary widely. For what purports to be the same article there are differences in prices arising from differences in grade, brand, or quality, while absolutely identical articles may vary according to the type of store in which they are sold or the locations of those stores. . . ."

B. CAUSES OF VARIATION.

(1) MURCHISON, *Resale Price Maintenance,* Columbia Univ., Studies in History, Economics and Public Law, Vol. 82, No. 2, pp. 21-2, 102.

"The selling methods of retailers vary greatly. Some afford their customers elaborate accommodations, parlors,

lounging rooms, finely-appointed sales rooms, music recitals, luncheons, fashion displays, etc. Their practice varies as to credit accommodations and the privilege of returning goods. Some stores deliver the goods to the homes of the customers, and even transport the customers themselves; others, of course, do neither. Some engage in extensive advertising, the giving of premiums, coupons, trading stamps; some make a habit of cutting standard prices. Some cater exclusively to the wealthy, some to the middle classes, some to the poor. . . . Apart from the selling function, the only universal characteristic to be found among retailers is that all of them handle large proportions of branded or trade-marked goods, and hence would in nearly all cases be affected in some way by a price-maintenance policy. Retailers vary not only as to characteristics and general selling methods, but also in their buying. Not all buy largely from jobbers. Some buy in large quantities, some in small, some pay cash, others always depend on credit; some believe in a variety of goods, others stock up only in staples. Some utilize co-operative associations for their buying, some prefer to buy independently.

"These considerations taken in connection with many other varying business methods lead one to the conclusion that, as regards retailers, types are very numerous. Therefore costs and profits among retailers must be widely variant. . . .

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". . . Throughout the country are thousands of dealers who, by means of legitimate economies, obtained by the exercise of superior business skill, superior organization, superior location, etc., are able to sell goods, both branded

and unbranded, without discrimination at prices lower than the usual. They do not exploit these goods. They sell them at a fair profit. . . ."

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(2) STEVENS, *Resale Price Maintenance as Unfair Competition,* 19 Columbia Law Review, 265, 268-9.

". . . The demands of the buying public vary widely not only with the purchasing power of the various individuals making up or comprising the group or community, but also with other economic conditions, as well as social factors which affect both the individual and the group. As a result one person prefers a somewhat lower quality of goods than another, provided he can obtain thereby a somewhat lower price. Another prefers good style to good quality. Some buyers pay cash either customarily or from force of necessity. Others demand and insist upon credit. One purchaser desires premiums which do not interest others, while many demand deliveries . . . of purchases which other buyers are content to carry home, etc. As a result of these and numerous other wide divergencies in the demands of the consuming public, different types of sellers and differences in methods of selling develop in an effort to supply human wants more adequately and satisfactorily. Consequently, there arise large stores and small stores; cash stores and credit stores; stores with delivery service, stores without; stores giving premiums and stores which do not; stores carrying high-grade merchandise and stores carrying low; stores in central high-rent locations and stores in neighborhood and low-rent sections. . . All of these factors bring about differences in costs of selling, while numerous other elements, such as volume of business, rate

of turnover, etc., also vitally affect the cost factor. Thus great divergencies in costs appear not only as between sellers of different lines and between different methods of selling, but also as between the sellers of the same lines utilizing identical or similar selling methods."

(3) SELIGMAN AND LOVE, *Price Cutting and Price Maintenance,* pp. 114-5.

". . . The same commodity may be sold at different prices in shops situated in different sections. The price of a given article in a shop located in a fashionable district will, of course, differ from that of precisely the same article sold in a shop in a more moderate neighborhood. The lower price in the latter shop is, therefore, only an ostensible example of a variation from uniform prices. Although we are dealing with the same commodity, we are not dealing with the same market. . . .

". . . A commodity is naturally sold under certain conditions; the price depends on the conditions of the transfer. If the conditions vary, the commodity, although physically the same, will be economically different. When one shop makes a practice of delivering its commodities free of charge, and grants to its customers the privilege of returning the goods if deemed unsatisfactory, while another shop insists on cash payment and restricts or refuses the privilege of exchanging or returning goods, it can scarcely be said that we are dealing with the same thing. If the conditions affecting the sale of physically identical commodities differ, then the commodities are, economically speaking, not the same. The discrepancies in the price are, therefore, ostensible rather than real. The purchaser gets less in the one case than the other, but he gets what he pays for: he pays less,

but gets less, and the seller in the cash and non-return store is able to quote a lower price because his cost is lower. Although he is selling the physically identical article at a lower price, he is really selling an economically different article at a lower price."

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(4) CONVERSE, *Elements of Marketing*, p. 882:

". . . Some stores give credit and delivery services with liberal return privileges; some are on a cash-carry and others on a cash-carry self-service basis. Operating expenses vary with the services performed, and we do not expect all these stores to sell at the same price. Many people prefer the economy stores. If they prefer to pay cash and to carry their goods home, it would seem that they should have this privilege and be allowed some compensation for performing the service for themselves."

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(5) NATIONAL INDUSTRIAL CONFERENCE BOARD, INC., *Public Regulation of Competitive Practices*, p. 94:

"But there are other elements in the final price to the consumer besides the return realized by the manufacturer. In the absence of resale price maintenance, these other elements representing the wholesalers' and retailers' margins will vary according to the costs of distribution under different systems and even according to the relative efficiency of different dealers operating within any particular system. . . . The final price will tend, in every instance, to reflect: (a) the relative distance of the consumer from the point of origin of the goods; (b) the extent and nature of the supplementary services furnished

by the merchant, *e. g.*, credit, delivery, repairs, shopping conveniences, etc.; and (c) the individual efficiency of the merchant in respect to the basic factors of mercantile management: stock-turnover, clerical expense, rent, and the like. . . ."

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(6) In California, according to the FIFTEENTH CENSUS OF THE UNITED STATES, *Distribution,* Vol. 1, *Retail Distribution,* Part 2, p. 172, 47.01% of all retail stores do an all-cash business; 32.16% do half or less of their business on credit, and 20.83% do more than half of their business in that way. In 11.87% of all stores, 70% or more of their total business is credit. The 1933 survey shows that of 89,554 retail stores reporting, 43%, doing 62% of the total business of the state, did a credit business. The credit sales reported by these stores represented 47% of their total sales. [U. S. BUREAU OF THE CENSUS, *Census of American Business, Retail Distribution* (1933), Vol. 1, p. A-20.]

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(7) FEDERAL TRADE COMMISSION, *Chain Stores, Final Report,* 74th Congress, 1st Sess., Sen. Doc. No. 4, p. 74.

". . . The advantages which inhere in a cash business with no credit losses and in savings on clerk hire and delivery expense are bound to be reflected in the lower cost of doing business which the inquiry shows characterizes chain-store operation."